No. 78-563

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE AMERICAN ASSOCIATION OF COUNCILS OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

WILLIAM KANTER
ALFRED MOLLIN
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-19 to A31) is reported at 575 F. 2d 1367. The opinion of the district court (Pet. App. A-1 to A-18) is reported at 421 F. Supp. 848.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1978. The petition for a writ of certiorari was filed on October 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether either the Administrative Procedure Act or 28 U.S.C. 1331 create jurisdiction for federal district courts to review this dispute about guidelines issued by the Secretary regarding elgibility standards under the Medicare Act.

STATEMENT

The Health Insurance for the Aged Act (commonly known as the Medicare Act), 42 U.S.C. 1395 *et seq.*, requires the Secretary of Health, Education, and Welfare to reimburse qualified "providers" for the "reasonable cost" of the medical services they furnish to eligible Medicare beneficiaries. 42 U.S.C. 1395, 1395f(b).

In order to become a qualified provider, an institution must have a "utilization review plan" that meets the requirements of 42 U.S.C. 1395x(k). See 42 U.S.C. 1395x(e)(6) and (j)(8). The purpose of "utilization review" is to promote the efficient use of medical services by requiring hospitals to review on a regular basis the kind and extent of medical services provided to patients. 42 U.S.C. 1395x(k).

The manner in which the committees performing the review function shall be composed is set forth in 42 U.S.C. 1395x(k):

> (2) * * * [S]uch review [is] to be made by either (A) a staff committee of the institution composed of two or more physicians, with or without participation of other professional personnel, or (B) a group outside the institution which is similarly composed and (i) which is established by the local medical society and some or all of the hospitals and skilled nursing facilities in the locality, or (ii) * * * which is established in such other manner as be approved by the Secretary;

The Secretary has used his general rulemaking authority (42 U.S.C. 1395hh) to establish with greater particularity the composition of the review committees. 20 C.F.R. 405.1035(e)(1).

The Secretary also has issued a manual (called HIM-7 in this litigation) to guide state health agencies in making their decisions whether hospitals are eligible to participate in the Medicare program. See 42 U.S.C. 1395aa(a). Unlike the statute, and unlike the regulation, HIM-7 indicated a mandatory preference for composition of utilization review committees. According to HIM-7, review must be conducted by a staff (in-house) committee where a hospital has a sufficient number (two or more) of physicians on the house staff to serve on a utilization review committee. The utilization review function may be carried out by a non-staff committee only where the establishment of a staff committee is not feasible.

Petitioner, an association representing physicians engaged in the private practice of medicine, brought this suit in the United States District Court for the Eastern District of Louisiana, seeking a declaration that the provisions of HIM-7 regarding the mandatory preference for the structure of utilization review committees (a) are inconsistent with the Act and exceed the authority granted to the Secretary; (b) are inconsistent with the federal regulations; (c) were promulgated by the Secretary in violation of the Administrative Procedure Act; and (d) violate the Constitution because they require physicians to serve on review committees "under pressure of serving on the medical staff of a hospital which is forced to withdraw from the medicare program * * * at the expense of their pursuit of the practice of medicine." The district court found that it had jurisdiction under the Administrative Procedure Act (Pet. App. A-4 to A-8) but ruled against petitioner on the merits (*id.* at A-9 to A-18).

The court of appeals vacated this judgment. It held that the district court lacked jurisdiction because 42 U.S.C. 1395ii incorporated into the Medicare Act the review preclusion provisions of 42 U.S.C. 405(h), which forbids judicial review of certain claims arising under the federal statute. The judicial review provisions of the Medicare Act do not authorize review of controversies such as this

one when raised by petitioner. See 42 U.S.C. 1395ff. Consequently, the court held, it was necessary to dismiss the suit, but without prejudice to petitioner's ability to cast its claims in a form reviewable under some other grant of jurisdiction (Pet. App. A-30 to A-31).

ARGUMENT

Petitioner asserts that the district court had jurisdiction of this case under two statutes: 28 U.S.C. 1331 and the Administrative Procedure Act. Petitioner is plainly wrong. The Court held in *Califano* v. *Sanders*, 430 U.S. 99 (1977), that the Administrative Procedure Act is not a grant of jurisdiction. It held in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), that Section 1331 is unavailable as a source of jurisdiction in cases arising under the Social Security Act and within the purview of 42 U.S.C. 405(h). The Medicare Act adopts Section 405(h) (see 42 U.S.C. 1395ii), and so jurisdiction under Section 1331 is unavailable to petitioner. See also *Mathews* v. *Eldridge*, 424 U.S. 319, 326-332 (1976). The Fifth Circuit, sitting en banc, held in *Dr. John T. MacDonald Foundation, Inc.* v. *Califano*, 571 F. 2d 328, cert. denied, No. 78-88 (Oct. 10, 1978), that these principles preclude review in the district courts of "provider" disputes under the Medicare Act unless that Act itself grants jurisdiction (as it does in 42 U.S.C. 1395ff and 1395*oo*). The Court denied review in that case, and there is no greater reason to grant review here.[1]

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[1]Petitioner's claim for relief unquestionably "arises under" the Medicare Act within the meaning of 42 U.S.C. 405(h), as that statute was interpreted in *Salfi*. Petitioner argues that the provisions of HIM-7 are inconsistent with the statute, and that claim thus is directly based on the statute. Petitioner's further argument that the manual, regulations and statute are unconstitutional if construed as the Secretary has argued also arises under the statute because it would not exist in the statute's absence. See 422 U.S. at 761.

Since we filed our response to the petition for certiorari in *MacDonald* a conflict among the circuits apparently has arisen concerning the extent to which claims of procedural irregularity in the promulgation of Medicare regulations may be adjudicated. *Humana of South Carolina, Inc.* v. *Califano*, No. 76-1953 (D.C. Cir. Sept. 18, 1978), slip op. 20-23, apparently holds that 28 U.S.C. 1331 supplies jurisdiction to adjudicate procedural claims based on the rules established by the Administrative Procedure Act. These procedural claims, the District of Columbia Circuit held, "arise under" the Administrative Procedure Act rather than the Medicare Act and thus may be adjudicated despite the applicability of 42 U.S.C. 405(h). We do not agree with that approach, which disregards the holding of *Salfi* that a claim "arises under" the Social Security Act (or Medicare Act) if the existence of the statute granting money is a sine qua non of the particular claim sought to be raised. In *Salfi* itself the Court held that a suit arguing that the Social Security Act violated the Due Process Clause of the Fifth Amendment "arose under" the Social Security Act. The same principle should apply to claims of procedural irregularity. See also *Mathews* v. *Eldridge supra* (procedural due process calim "arises under" the statute).

But however that may be, there is no need for the Court to consider the problem in this case. Petitioner has never argued that, for jurisdictional purposes, its procedural claim should be treated differently from its other contentions. The point would be entirely academic if petitioner should attempt to assert some other ground of jurisdiction that would apply to all of its arguments (see page 6, *infra*). It would therefore be premature for the Court to grant review to address this aspect of the court of appeals' treatment of jurisdiction under 28 U.S.C. 1331.

Petitioner argues, however, that if 42 U.S.C. 1395ii deprives it of judicial review, then that statute is unconstitutional. This Court has enforced review preclusion statutes. See, *e.g.*, *Union Pacific R.R.* v. *Sheehan*, No. 78-344 (Dec. 4, 1978); *Briscoe* v. *Bell*, 432 U.S. 404 (1977). But there is no need here to debate the constitutionality, as a general matter, of review preclusion statutes. The decision of the court of appeals did not hold that all forms of judicial review are "precluded".

This suit is a request for judicial relief filed by persons who are not directly affected by the statute and regulation in question. Petitioner is not a "provider" of medical services and does not seek to become one. It asserts only that its members may be affected by the Secretary's rules

when they are applied to "providers" of services and the "providers," in turn, require their employees or physicians to serve on review committees. Petitioner's members, in other words, contend that they may suffer incidental consequences because of the application of the rules to others. Those to whom the rules directly apply can, in many instances, obtain judicial review. See 42 U.S.C. 1395ff(b)(1).

Because it seeks to obtain review of an incidental effect on its members, petitioner may have "standing" in the Article III sense. Compare *United States* v. *SCRAP*, 412 U.S. 669 (1973), with *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). But no principle of constitutional law requires Congress to make judicial review available at the behest of *every* person who has minimal Article III standing but who is only aggrieved indirectly. It should be enough, in most circumstances, that the controversy is of a sort that can be resolved at the behest of some aggrieved party. That is true here, for the providers themselves may obtain judicial review of the issue petitioner seeks to raise.

Moreover, the court of appeals did not preclude the possibility that petitioner or its members could obtain judicial review under 28 U.S.C. 1361 in the district court[2] or, if they could show monetary harm, in the Court of Claims.[3] See Pet. App. A-30 to A-31. Until those possible sources of jurisdiction have been explored, petitioner cannot call on this Court to resolve whatever constitutional questions may lurk in an absolute preclusion of judicial review.

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[2]The question whether 28 U.S.C. 1361 permits judicial resolution of cases otherwise covered by 42 U.S.C. 405(h) is before the Court in *Califano* v. *Elliott*, cert. granted, No. 77-1511 (Oct. 2, 1978). We have furnished a copy of our brief in *Elliott* to counsel for petitioner.

[3]The Court of Claims has held that 28 U.S.C. 1491 gives it jurisdiction to review claims for damages arising out of the Medicare Act and the implementing regulations. See *Appalachian Regional Hospitals, Inc.* v. *United States*, 576 F. 2d 858 (1978); *Whitecliff, Inc.* v. *United States*, 536 F. 2d 347 (1976), cert. denied, 430 U.S. 969 (1977). Although, of course, the Court of Claims is not empowered to issue declaratory judgments or injunctions, petitioner does not contend that the Constitution requires that these particular remedies be available. It is enough that the remedy be adequate, and money damages is at least presumptively an adequate remedy. Cf. *Snyder* v. *Marks*, 109 U.S. 189 (1883). (We have argued that the Court of Claims' assertion of jurisdiction under Section 1491 is erroneous, and if petitioner should file suit in the Court of Claims we would move to dismiss for want of jurisdiction. Given *Whitecliff*, however, the court likely would deny such a motion.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

WILLIAM KANTER
ALFRED MOLLIN
Attorneys

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